IN THE

Supreme Court of the United States

October Term, 1962

No. 492

THE COLORADO ANTI-DISCRIMINATION COMMISSION AND EDWARD MILLER, MRS. PAUL BUDIN, CLARENCE C. BELLINGER, GENE MANZANARES, ROBERT C. KEELER, GEORGE J. WHITE, and GEORGE O. CORY, as members of said Commission, and MARLON D. GREEN,

Petitioners,

vs.

CONTINENTAL AIRLINES, INC.,

Respondent.

Brief for the Catholic Council on Civil Liberties as Amicus Curiae.

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IN THE

Supreme Court of the United States

October Term, 1962
No. 1325 Misc.

THE COLORADO ANTI-DISCRIMINATION COMMISSION AND EDWARD MILLER, MRS. PAUL BUDIN, CLARENCE C. BELLINGER, GENE MANZANARES, ROBERT C. KEELER, GEORGE J. WHITE, and GEORGE O. CORY, as members of said Commission, and MARLON D. GREEN,

Petitioners,

vs.

CONTINENTAL AIRLINES, INC.,

Respondent.

Brief for the Catholic Council on Civil Liberties as Amicus Curiae.

Consent to File.

This brief is filed pursuant to Supreme Court Rule 42(2). Consent of all parties of record has been filed separately wtih the Court.

Interest of Amicus Curiae.

At their annual meeting in Washington D. C., in 1958, the Catholic bishops of the United States issued a statement on "Discrimination and the Christian Conscience." In this declaration the bishops called upon "responsible and soberminded Americans of all religious faiths" to "seize the mantle of leadership from the agitator and the racist." The bishops identified the heart of the race question as "moral and religious" and em-

phasized that "it is vital that we act now and act decisively." In their statement the bishops singled out denial of job opportunity, along with substandard education and housing, as "oppressive conditions" which have been imposed upon the American Negro by segregation. Two reasons were listed to show that the Christian view of man and enforced segregation cannot be reconciled:

> (1) "Legal segregation, or any form of compulsory segregation, in itself and by its very nature imposes a stigma of inferiority upon the segregated people."
>
> (2) "It is a matter of historical fact that segregation in our country has led to oppressive conditions and the denial of basic human rights for the Negro."

Although the Irish, Jewish, Italian, Polish, Hungarian, German, and Russian immigrants have achieved their rightful place in American society, the bishops pointed out, Negroes still seek the same opportunity:

> "They wish their civil rights as American citizens. No one who truly loves God's children will deny them this opportunity."

It is in this spirit that the Catholic Council on Civil Liberties writes this brief, joining its efforts with Americans of other faiths hopefully to achieve a greater measure of job opportunity for the American Negro in the industries where most of the jobs are, the industries which are covered by the commerce clause of the Federal Constitution.

The Catholic Council on Civil Liberties is an affiliate of the National Catholic Social Action Conference of

the National Catholic Welfare Conference. CCCL is the successor of the American Freedoms Council, which was organized in 1958 by a group of Catholic laymen in Omaha, Nebraska. The national director of the organization is a layman, Thomas Francis Ritt, of Lawndale, California, and chairman of the national advisory committee is Edward J. McCormack, Attorney General of Massachusetts. The national advisory committee and the board of directors include many prominent leaders of Catholic thought, among them Dean Joseph O'Meara, Jr., School of Law, Notre Dame University; Rev. John F. Cronin, S. S., Assistant Director, Social Action Department, NCWC; Edward A. Marciniak, Treasurer, National Social Action Conference, NCWC; John Cogley, Center for the Study of Democratic Institutions; Rev. George H. Dunne, S. J., Georgetown University; Dean John C. Hayes and Rev. William J. Kenealy, S. J., Loyola University School of Law, Chicago; Dean Vincent C. Immell, School of Law, St. Louis University; Rev. L. J. Twomey, S. J., Director, Institute of Industrial Relations, Loyola University, New Orleans; Rev. Louis A. Gales, President, Catholic Digest; Richard Deverall, UAW, AFL-CIO, Washington, D. C.; Professor Edgar A. Jones, Jr., School of Law, University of California at Los Angeles; William B. Ball, counsel, Pennsylvania Catholic Welfare Committee; Rev. Benjamin L. Masse, S. J., Associate Editor, America and Professor Victor Ferkiss, Georgetown University.

Marlon D. Green is a Catholic. Perhaps this is the reason he invited the Catholic Council on Civil Liberties to file as *amicus curiae* in his case. But the CCCL has not entered the case merely to defend a parochial interest. The CCCL belongs in a case like this because

the question of racial equality "concerns the rights of man and our attitude toward our fellow man," to quote the bishops' 1958 statement once again, and because the dignity of all men is degraded when a Negro is denied employment because of his race.

Statement of the Case.[1]

Marlon D. Green, a pilot officer in the U. S. Air Force with the rank of Captain, returned from an Air Force tour of duty in Japan in April, 1957, and applied for employment as a pilot with respondent, Continental Air Lines, Inc., herein called Continental [pp. 224-225]. The application was placed on file, and in June, 1957, Continental began recruiting to fill some fourteen or fifteen pilot positions. Continental at that time sent Green an invitation to come to its administrative offices in Denver for an employment interview, not knowing he was a Negro [pp. 226, 227, 433]. In Denver Green took and passed a link trainer and flight test administered by respondent [pp. 231, 232, 235-239]. Five other applications were considered along with Green at about the same time, and the flying experience of the six applicants is shown by the following table:

	Total Hours	First Pilot	Co-Pilot	Multi-Engine	
Green	3071:30	1838:15	778:45	2900:00	[pp. 490, 310]
George	2100:53	1145:35	874:13	897.23	[pp. 474, 494]
Stearns	1200:00	750:00	450:00	934:00	[pp. 478, 493]
Bryant	1150:00	1160:00	—	5:00*	[pp. 486, 495]
Dresser	1031:00	916:00	—	—	[pp. 482, 496]
Cole	1000:00	900:00	100:00	200:00	[pp. 470, 497]

[1]References will be made to page numbers of the consolidated record.

*Acquired between June 25, 1957, when Green and Bryant were examined, and July 1, 1957.

Respondent's Vice President in charge of personnel admitted that Continental considered Green to be a qualified pilot [p. 343]. Four of the five who applied with Green were asked to enter Continental's training program in June, 1957, and the fifth was asked in September, 1957. Meanwhile, Continental hired ten additional pilots in August [pp. 325, 353, and 365]. Green was never asked and was never hired.

On August 13, 1957, Green filed a complaint with the Colorado Anti-Discrimination Commission [p. 165], and in its answer respondent set up the defenses of conflict with the commerce clause of the federal Constitution, Article I, Sec. 8, and federal pre-emption [pp. 172-175]. Hearing before the Commission was held on May 7, 1958 [p. 180], and on December 19, 1958 the Commission entered its Findings of Fact, Conclusions of Law, and Orders in the case (App. C, Pet. for Cert. filed by the Commission), requiring respondent to give Green the first opportunity to enroll in its next training course with a priority status of June 24, 1957. The Commission found that Green was denied employment because of his race, although he was "better qualified for the position of co-pilot than any applicant interviewed."

Continental appealed the Commission's decision to the District Court of Denver, Colorado, which remanded the case to the Commission to make findings of fact as to whether Continental was engaged in interstate commerce, whether Continental was subject to the anti-discrimina-

tion statute, and whether the employment for which Green had applied actually involved interstate commerce [pp. 44, 45]. The Commission thereupon made a new decision and purported to vacate its original one [pp. 526-544], and the District Court thereafter held that the Commission's new action had rendered the complaint moot [p. 65]. Upon review in the Colorado Supreme Court by writ of error, *Colorado Anti-Discrimination Commission v. Continental Air Lines, Inc.* (1960), 355 P. 2d 83, the Supreme Court held the Commission was powerless to withdraw its initial decision and that its second decision was void. The District Court was ordered to rule on the first decision of the Commission.

In the District Court proceedings which followed, the parties entered a stipulation to the effect that Continental was engaged in interstate commerce, that the Commission would find Continental was subject to the Anti-Discrimination Act, and that the position Green had applied for involved interstate operations [pp. 550-551]. In extensive Findings of Fact, Conclusions of Law, and Judgment, the District Court held that as applied to Continental the Anti-Discrimination Act was an unreasonable burden upon interstate commerce and hence invalid under the commerce clause, and it held further that jurisdiction over the subject matter had been preempted by the Railway Labor Act, the Civil Aeronautics Act of 1938, and federal executive orders.

Writ of error was then brought in the Colorado Supreme Court, which affirmed the trial court judgment

on the ground that the Colorado statute offended the commerce clause. The Court observed that "The findings, conclusions, and judgment of the trial court might well be adopted in toto as the opinion of this court." *Colorado Anti-Discrimination Commission v. Continental Air Lines, Inc.*, 368 P. 2d 970. Both Green and the Commission applied for certiorari, which was granted.

The Issue.

The issue in this case is whether Colorado is barred from applying its Anti-Discrimination statute to applicants for employment with interstate carriers by air, either by reason of the Commerce clause of the Federal Constitution, Article I, Section 8, Clause 3, or on the ground that the Railway Labor Act, the Civil Aeronautics Act of 1938, the Federal Aviation Program Act, and federal executive orders have pre-empted the field of race discrimination in hiring to the exclusion of the states.

Summary of Argument.

I.

The Colorado Anti-Discrimination Act does not burden or impede the free flow of interstate commerce. On the contrary, it removes a costly and wasteful obstruction to interstate commerce.

A. National uniformity is not necessary in the hiring of employees as it is in the transportation of passengers.

B. A balancing of state and national interests clearly shows that the state regulation is reasonable.

C. Continental rejected the best qualified applicant on account of race. This is the real burden upon commerce in this case, and state police power is competent to remove it.

II.

Neither the Railway Labor Act, the Civil Aeronautics Act, the Federal Aviation Program Act, nor federal executive orders indicate an intention to occupy the field of hiring applicants for employment to the exclusion of the states.

A. Pre-emption principles stated in *Corsi* and *Garmon* sustain State regulation here.

B. The Railway Labor Act does not govern racial policies of carriers relating to hiring.

C. The Civil Aeronautics Act does not exclude state jurisdiction.

D. Colorado's program does not interfere with enforcement of federal executive orders.

ARGUMENT.

I.

The Colorado Anti-Discrimination Act Does Not Burden or Impede the Free Flow of Interstate Commerce. On the Contrary, It Removes a Costly and Wasteful Obstruction to Interstate Commerce.

A. National Uniformity Is Not Necessary in Hiring Employees as It Is in the Transporation of Passengers.

The Court below relies heavily upon *Morgan* and *Hall v. DeCuir*, 95 U. S. 485 (1878). But those cases, on their facts, picture a checkerboard pattern of interstate passenger carriage resulting from diverse State regulations, with buses and carriers by water being stopped at State boundaries to rearrange passengers to suit the conflicting policies of the various jurisdictions. Accordingly, a need for national uniformity was found to exist in passenger regulations, and the Court observed in *Hall* that:

> "On one side of the river or its tributaries (the carrier) might be required to observe one set of rules, and on the other another. Commerce cannot flourish in the midst of such embarrassments. No carrier of passengers can conduct his business . . . if on one side of a State line his passengers, both white and colored, must be permitted to occupy the same cabin, and on the other be kept separate."

Morgan found the same need for national uniformity to avoid the interference with commerce occasioned by the requirements of the Virginia statute that passengers be repeatedly required to shift seats.[2]

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[2]*Cf. Southern Pacific Company v. Arizona*, 325 U. S. 761 (1945), *Bibb v. Navajo Freight Lines, Inc.*, 359 U. S. 520 (1959),

But no such specter is conjured up by the case at bar. The Fourteenth Amendment precludes possibility of a checkerboard of conflicting state policies in the field of hiring, for no state could promote a policy of discrimination in employment without denying equal protection. *Shelley v. Kraemer*, 334 U. S. 1 (1948); *Brown v. Board of Education*, 347 U. S. 483 (1954). If State A has a no-discrimination policy which it applies to airline pilots, and State B has no policy one way or another, this threatens no interruption of commerce in State B or anywhere else. This important difference between carrying passengers on the one hand, and hiring employees on the other, would seem to make the passenger cases inapplicable to the problem now before the Court.

B. A Balancing of State and National Interests Clearly Shows That the State Regulation Is Reasonable.

Where a State regulation is challenged on the ground that it violates the commerce clause of the Federal Constitution, Article I, Section 8, the question whether the regulation unreasonably burdens interstate commerce is determined by looking to the facts of each case and then balancing the interest which the State seeks to further against the interest of the nation which is alleged to be adversely affected.

On the side of the scale which represents the interest sought to be protected by the State, we have in the case

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where novel State regulations were similarly struck down because they directly interfered with interstate movement of trains and trucks. In *Arizona* the State regulation prevented the free flow of commerce "by delaying it and by substantially increasing its cost and impairing its efficiency." In the case at bar, however, the State regulation involves no delay to planes in transit, no increase in costs whatever, and no impairment of efficiency.

at bar a permissible object for the exercise of the police power, namely, equality of job opportunity regardless of race or creed. *Railway Mail Association v. Corsi*, 326 U. S. 88 (1945), *Bob-Lo Excursion Co. v. Michigan*, 333 U. S. 28 (1948). The case is thus distinguished from *Morgan v. Virginia*, 328 U. S. 373 (1946), relied upon by the court below, because *Morgan* involved an unlawful object of a Virginia statute, namely, discrimination against Negroes in interstate travel.

Not only is Colorado's object a constitutionally permissible one, but the means the state has chosen bear a reasonable relation to the object sought to be achieved. In this important respect, the case at bar differs from a number of cases in which local regulation of interstate commerce has been invalidated on the ground, among others, that the means chosen in the State regulatory programs were not shown to serve their declared purposes effectively. Examples are *Southern Pacific Co. v. Arizona*, 325 U. S. 761 (1945), where the Arizona long-train statute, passed as a safety measure, was found to make train operation more dangerous, and *Bibb v. Navajo Freight Lines, Inc.*, 359 U. S. 520 (1959), where contour mudguards required by an Illinois statute in the name of safety possessed no advantage over the conventional mudguard but probably created "hazards previously unknown on the highways." In the instant case, however, there is no showing that the means chosen by Colorado to accomplish the purpose of equality in employment will be ineffective.

Thus, in an effort to determine whether the State's regulation unreasonably burdens interstate commerce, we have found, on the side of the scale representing the State's interest, a proper object served by proper means.

On the side of the scale representing the Federal interest, what are we to balance against this?

If we seek to identify a national interest which is opposed to the State's interest here, we can find none. For at stake in Green's case is the question whether the American people will perform or sorely disappoint the promise—the American dream, if you will—of equal opportunity for equally qualified men in employment, regardless of race. Every United States post office displays literature in which young Americans of all races are urged to join one or another of the armed forces to learn a trade. Surely the national interest is not well or decently served by a policy which would cynically nullify the inducement the government has offered to these young men. We dare not say to the Marlon D. Greens of America that their country will train them to fly airplanes in its defense, but if they try to use the training so acquired to get jobs to support themselves and their families, their country's interest, as reflected in its supreme law, must bar their employment.

In this case the scales on which State and Federal interests are weighed are one-sided, for no national concern requires Colorado to abandon the vital interest it would protect by its anti-discrimination statute. The national interest is not frustrated but on the contrary is fostered by the regulation Colorado has adopted. Accordingly, the regulation must be found to be eminently reasonable.

C. Continental Rejected the Best Qualified Applicant on Account of Race. This Is the Real Burden Upon Commerce in This Case, and State Police Power Is Competent to Remove It.

Marlon D. Green was denied employment because of his race, although he was "better qualified for the position of co-pilot than any applicant interviewed. . . ." Such was the finding of the Colorado Anti-Discrimination Commission.[3] Green, with 3,071 flying hours, was rejected because his skin was black, and Cole with 1,000 flying hours, only half of the minimum stated by Continental in its list of qualifications, was put to work flying the company's airplanes in interstate commerce. Continental's policy of rejecting Negroes, however well qualified, is thus patently shown to render its passenger service less efficient. Its discriminatory policy is clearly an obstruction to commerce, and all who fly on its planes are compelled to pay the price of Continental's discrimination. The price they pay is that they are sometimes not served by the best qualified and most experienced employees. What is Colorado seeking here but to remove this costly and wasteful obstruction to interstate commerce? Compare those constitutionally allowable State regulations cited in *Southern Pacific Co. v. Arizona*, 325 U. S. 761:

> ". . . where a state, by regulatory measures affecting the commerce, has removed or reduced safety hazards without substantial interference with the interstate movement of trains. Such are measures

[3]See Green's petition for certiorari, pages 6 and 7.

> abolishing the car stove . . ., requiring locomotives to be supplied with electric headlights . . ., providing for full train crews . . ., and for the equipment of freight trains with cabooses . . . (citing cases)."

Thus it is seen that *Green* is properly grouped with the cases where a State regulatory effort was found to be an aid to commerce and not an interference with it, and where on that account the commerce clause did not invalidate the State regulatory program.

II.

Neither the Railway Labor Act, the Civil Aeronautics Act, the Federal Aviation Program Act, nor Federal Executive Orders Indicate an Intention to Occupy the Field of Hiring Applicants for Employment to the Exclusion of the States.

A. Pre-emption Principles Stated in Corsi and Garmon Sustain State Regulation Here.

In the field of race relations, the governing principle for the solution of pre-emption problems is stated in *Railway Mail Ass'n v. Corsi,* 326 U. S. 88 (1945), where the Court indicated that "Congress must clearly manifest an intention" to exclude State regulation "before the police power of the state is powerless." On this test alone the claim of pre-emption must fall in the instant case, for in no statute has Congress "clearly manifest" an exclusory intention.

In the area of industrial relations, one of the principal tests applied by the Court to determine whether federal pre-emption exists has been stated in *San Diego Building Trades Council v. Garmon,* 359 U. S. 236 (1959),

which summed up the results reached in a long line of labor relations cases as follows:

> "When the exercise of state power over a particular area of activity *threatened interference with the clearly indicated (federal) policy of industrial relations*, it has been judicially necessary to preclude the States from acting." (Emphasis supplied).

But one looks in vain in the case at bar for the merest suggestion of any "threatened interference with the clearly indicated (federal) policy of industrial relations" or with any other federal policy.

B. The Railway Labor Act Does Not Govern Racial Policies of Carriers Relating to Hiring.

The Railway Labor Act, 45 U. S. C. 151 *et seq.*, cannot be said to address itself to the racial hiring policies of the airlines. Cases arising under the Railway Labor Act and relied upon expressly by the trial court and inferentially by the Supreme Court of Colorado (*Colorado Anti-Discrimination Commission v. Continental Air Lines Inc.*, 368 P. 2d 970) do not support the view that that statute pre-empts the field of race discrimination in hiring applicants for employment. *Steele v. Louisville and Nashville R.R. Co.*, 323 U. S. 192 (1944); *Bortherhood of R.R. Trainmen v. Howard*, 343 U. S. 768 (1952), and *Conley v. Gibson*, 355 U. S. 41 (1957), stand for the principle that a labor organization certified to represent employees in a craft or class on a covered carrier has a duty of fair representation, *i.e.*, a duty to represent all employees in the bargaining unit fairly, without distinction as to race. This conclusion derives from the proposition that under the statute

the representative of the majority is the exclusive representative of all employees in the bargaining unit, and that such employees may not be represented by minority unions or even by themselves. These cases by no means transform the Railway Labor Act into a federal Fair Employment Practices Act for rail and air carriers; the decisions do not purport to direct what *employers* may or may not do in hiring *applicants* for employment on the basis of race.

Indeed, it may well be questioned whether the Railway Labor Act legislates with respect to applicants for employment at all:

> Fifth. The term 'employee' as used herein includes *every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his services)* who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission (emphasis added).[4]

The purposes of the Railway Labor Act as recited in 45 U. S. C., Sec. 151(a), include no attempt to deal with the problem of racial discrimination by carriers in hiring applicants for employment, and no other provision of that enactment deals with that question. See *Slocum v. Delaware, L. & W. R. Co.*, 339 U. S. 239, and *Terminal Ass'n v. Trainmen*, 318 U. S. 1 (1943).

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[4]Railway Labor Act, 45 U. S. C. Sec. 151(5). Compare the very broad language of the National Labor Relations Act, 29 U. S. C. Sec. 152(3).

C. The Civil Aeronautics Act Does Not Exclude State Jurisdiction.

Another prong of the pre-emption argument involves the contention, expressly adopted by the trial court and evidently approved by the Supreme Court of Colorado, that the Civil Aeronautics Act, 49 U. S. C. Sec. 484(b), (and the successor Federal Aviation Program Act, 49 U. S. C. Supp. Sec. 1301 *et seq.*) without doubt precludes discrimination in employment. On this point we find ourselves in full agreement with the view expressed on behalf of the United States Department of Justice to the effect that it is unnecessary for the Court to essay a determination of this far-reaching question in the context of this case.

We believe it is enough to say that even if the Civil Aeronautics Act were construed to affect employment discrimination, the suggestion that this statute pre-empts the field should be repudiated for two reasons: First, because there is no reason why anyone bent upon a successful administration of the Civil Aeronautics Act would find State regulation of discrimination in employment to be a hinderance; and second, because the strongest assertion which may fairly be made on the subject of the relation of the C. A. A. to race discrimination in employment is that such discrimination is *arguably* a peripheral concern of the statute. In this regard the controlling principle is that where the area of possible overlap is one which is merely a peripheral concern of the federal statute, a Congressional intention to exclude state jurisdiction is not to be found. *International Association of Machinists v. Gonzales,* 356 U. S. 617 (1958).

D. Colorado's Program Does Not Interfere With Enforcement of Federal Executive Orders.

The final argument, that there has been federal supersedure of state authority by virtue of executive orders, may be quickly disposed of. Even conceding, *arguendo*, that orders of the executive affect the employment practice here in question, the very fact that the Department of Justice participates in this case on the side of petitioners shows conclusively that the executive charged with the administration of its own orders does not regard the State effort as an interference but rather as an aid in the implementation of a common policy. Under these circumstances the national interest has been defined by the executive to include support for the State regulation, and there is no cause for the Court to make a contrary determination.

Conclusion.

It is unthinkable that the Court which gave the nation *Brown v. Board of Education*, 347 U. S. 483 (1954), would this late in the day turn back the clock and deprive the States of constitutional authority to help Negroes obtain the jobs which have so long been denied them in industries which do business in interstate commerce. Educational opportunity without job opportunity is a fraud. Education without work can yield only bitterness and frustration and inevitably deepens the sense of inferiority suffered by the persons against whom the discrimination is practiced.

The Colorado statute challenged in this case serves a proper purpose for the exercise of the police power and uses means reasonably related to that purpose. The State regulation does not impede the free flow of in-

terstate commerce, as did the passenger regulations in *Morgan* and *Hall*, but on the contrary removes a costly and wasteful obstruction to the flow of commerce among the states.

Finally, neither the Railway Labor Act, the Civil Aeronautics Act, the Federal Aviation Program Act, nor federal executive orders can fairly be construed to intend to occupy the field of racial discrimination in hiring to the exclusion of the states.

An approach to this problem which would turn the limited efforts of the federal government to shield Negroes from job discrimination into a sword with which to strike down vital efforts of some twenty states to achieve equality in employment is not well calculated to win the respect of mankind for the rule of law in our land.

QUENTIN OSCAR OGREN,
Attorney for the Catholic Council on Civil Liberties as Amicus Curiae.

December 10, 1962.